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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 64

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

Appellants.

vs.

STANDARD OIL COMPANY OF LOUISIANA,

Appellee.

BRIEF FOR APPELLEE

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For Appellee.

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Appellants,

vs.

STANDARD OIL COMPANY OF LOUISIANA,

Appellee.

BRIEF FOR APPELLEE

The Legislature of Tennessee having passed, in April, 1927, an act providing for the fixing of gasoline prices in Tennessee (pp. 16-23), the Standard Oil Company of Louisiana filed its bill (pp. 2-15) in the United States District Court at Nashville against the State officials charged with the enforcement of the act to enjoin them from enforcing it. Temporary restraining order was granted at once and, after answers filed by all the defendants, plaintiff's application for a temporary

injunction was heard by a statutory court of three federal judges. That court rendered an opinion (pp. 123-128) holding the act unconstitutional because in violation of the 14th Amendment and granted the preliminary injunction (p. 129), whereupon this appeal was prosecuted by the defendants.

For convenience, the parties will generally be referred to as in the court below—plaintiff and defendants. All italics are ours unless otherwise indicated.

Jurisdiction

The bill disclosed diversity of citizenship and also questions arising under the federal constitution. It shows that more than the sum of $3,000, exclusive of interest and costs, is involved.

The Act in Question

Although the Act is copied in the record (pp. 16-23), a brief digest of it here may be useful.

Sec. 1. A bureau is established to be known as the Division of Motors and Motor Fuels to be in charge of a superintendent.

Sec. 2. This Superintendent shall make an investigation and collect and record data as to the manufacture and sale of gasoline, the cost of refinery process, freight rates, "*differentials and prices to the wholesale dealer and the retail dealer,*" expense incident to the sale of gasoline, methods of distribution by manufacturers and dealers, and such other information as will be material in ascer-

taining what price will be "fair and reasonable to be paid for gasoline *by wholesale dealers, retail dealers* and consumers." It is his duty to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale at wholesale or retail of gasoline in Tennessee "at prices fixed and determined as hereinafter provided."

Sec. 3. It is made unlawful for any person to engage in the sale of gasoline in intrastate commerce in Tennessee without first having a permit and no permit shall issue except upon application therefor under regulations provided in the act and "in compliance with the requirements and provisions hereof."

Sec. 4. Every person desiring to deal in gasoline in intrastate commerce must make application to the superintendent setting out:

(a) Whether he proposes to sell at wholesale or retail or both; the number and location of his places of business and the number of pumps to be operated.

(b) Information as to the name and address of the applicant, his principal office, etc.

(c) The price at which the applicant is selling gasoline at his different locations.

(d) "The cost price of such gasoline to said dealer, including the refinery cost, transportation

cost, taxes and inspection fees, the cost of distribution and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline."

(e) The price or prices at which the applicant proposes to sell.

(f) Such other information as the superintendent may prescribe.

Sec. 5. It is made the duty of the Superintendent to take into consideration all of the information acquired under the preceding sections and, if the price at which the applicant proposes to sell "does not exceed a reasonable profit to the dealer after figuring the cost to the dealer, freight and expenses in marketing *and making a proper differential between the wholesale and retail prices,* and the same is in the interest of the public," to issue the permit. If, however, the Superintendent does not approve such prices, "then it shall be his duty to fix and name a price at which gasoline may be sold by the said applicant" and to notify the applicant in writing. If the latter is dissatisfied, he may have the action of the superintendent reviewed by the Commissioner, and, if still dissatisfied, have the Commissioner's action reviewed in the courts.

Sec. 6. It is made unlawful for any person "engaged in selling gasoline in Tennessee at either wholesale or retail" to change his prices without the consent of the Superintendent. This consent can be had not earlier than five days after the

application is filed and, in determining whether the change shall be permitted, the same considerations shall govern and the same right of review is given.

Sec. 7. The Attorney General "or any other person interested, "*whether as dealer* or as consumer," may file with the Superintendent objections to any price or prices maintained by any dealer on the ground that such prices "are exorbitant or unfair to the public *or to any other dealer,*" whereupon proceedings akin to those already outlined are had.

Sec. 8. It is made unlawful for any person engaged in the intrastate sale of gasoline at wholesale or retail in Tennessee to grant "any rebate to any customer or purchaser of said gasoline from any dealer or to sell any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any purchaser or customer for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer." It is also made unlawful to discriminate against or in favor of any customer or purchaser of said dealer "by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality," except so far as the differences in freight rates affect the price. It is also made unlawful for any person "to bring about an unlawful or unreasonable increase in the refinery price of gasoline to

dealers in Tennessee.'' No person violating the provisions of this section shall be entitled to a permit and the Governor, the Attorney General or any other person interested, *whether dealer or consumer,* may file a complaint with the Commissioner against such person, whereupon proceedings may be had similar to those already outlined.

Sec. 9. The Attorney General or some one of his assistants is made the law officer of said Division who shall represent the public in all proceedings before the Division or growing out of its orders.

Sec. 10. Before obtaining a permit to deal in gasoline, every person must pay the special permit tax of $10.00 on each place conducted for the wholesale marketing of gasoline and of $1.00 for every service station—these taxes to be in addition to all other taxes.

Sec. 11. This defines the term gasoline ''as used in this act.''

Sec. 12. If any section or provision of this act is held invalid, the validity of the remaining sections shall not be affected.

Sec. 13. The act takes effect from and after its passage.

The act was approved by the Governor April 8, 1927. The language italicized indicates a purpose to protect *the middleman* rather than the public.

How Gasoline Is Sold

It is important to note how gasoline sales are made—as outlined in the bill. There are three kinds of sales: tankcar sales, tankwagon sales and sales from service stations. The first embraces sales by the refinery or manufacturer and delivery is made in tankcar on tracks serving the purchaser's plant. These sales are almost invariably interstate. The second embraces sales from tankwagons which get their supply from the bulk station of the seller in Tennessee. Such sales are made by middlemen and are usually, though not always or necessarily, to a retail dealer. The third class comprehends sales by the retail dealer (a middleman) to members of the consuming public.

Record, pp. 3, 68.

These facts are important as throwing light on what is meant in the act by protecting the differential. The middleman is concerned not so much with the price the consuming public pays as with the margin between the price he pays and the price at which he sells. The protection of this margin must often occur at the expense of the ultimate consumer, and, as we shall argue later herein (infra, p. 43), renders the act void.

BRIEF

1. The act in question is a violation of the Fourteenth Amendment in that it deprives the plaintiff of its freedom of contract.

Tyson v. Banton, 273 U. S. 418.
Fairmount Co. v. Minn., 274 U. S. 1.
Lochner v. New York, 198 U. S. 59.
Ribnik v. McBride, 72 L. Ed. 614.
Wolf Pack. Co. v. Court, 262 U. S. 522.
Ibid., 267 U. S. 552.

2. The business of selling gasoline is not one affected with a public interest and, therefore, not subject to price regulation by the State.

Authorities *supra.*
Infra, pp. 31 et seq.

3. The attempt of the legislature to declare the business of selling gasoline one affected with a public interest is not effective for that question is a judicial one.

Tyson v. Banton, 273 U. S. 418.

4. Assuming for the purpose of argument that evils exist in the gasoline trade, those evils may not be cured save by legislation which comports with the Constitution and this price regulation is not of that character.

Tyson v. Banton, 273 U. S. 418.
Fairmount Creamery v. Minnesota, supra.

5. That price regulation is not and can not be a constitutional means of correcting the alleged evils in the gasoline business necessarily results from two propositions:

(a) The act is all embracing, including alike the large corporation which operates extensively and the small dealer who operates a single pump as an incident to his grocery store. If it were not so it would be invalid for partiality.

Cotting v. Godard, 183 U. S. 79.
McFarland v. Sugar Ref. Co., 241 U. S. 79.
Quaker City Cab Co. v. Penn., 72 L. Ed. 614.

(b) Being, of necessity, all embracing, the statute "fixes the retail prices as well where the evils are absent as where they are present" and "it is not permissible to enact a law which, in effect, spreads an all inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught."

Tyson v. Banton, 273 U. S. 443.
Fairmount Cr. v. Minn., 274 U. S. 1.
U. S. v. Reese, 92 U. S. 221.

6. No case can be found in American jurisprudence which, in the absence of a war emergency, has sustained the right of the state to regulate the price at which an ordinary article of commerce may be sold.

Infra, p. 35 et seq.

7. The act is invalid because its purpose and effect is not merely to protect the price paid by

the consuming public but margins in favor of middlemen.

Infra, p. 43.

8. Alleged unlawful practices of a gasoline dealer in the conduct of its business can not defeat its right to maintain a bill in equity to restrain the threatened enforcement of a state statute to regulate its business which violates its rights under the Constitution. *Neither the piety nor the depravity of the persons affected by a statute can determine its constitutionality.*

McFarland v. Sugar Ref. Co., 241 U. S. 79.

9. Nor can the act be sustained on the theory that plaintiff is a foreign corporation and therefore subject to any condition the State may choose to name.

Hanover Ins. Co. v. Carr, 272 U. S. 499.
Fidelity Co. v. Tafoya, 270 U. S. 426.
Quaker City Co. v. Penn., 72 L. Ed. 614.

10. The act can not be sustained on the theory that it is necessary to prevent a monopoly and to protect competition. It does not protect but destroys competition and, assuming for purpose of argument only that a monopoly is threatened, price regulation is not the constitutional remedy.

Infra, pp. 50 et seq.

11. The act violates the provision of the Federal Constitution which prohibits any state from passing a law impairing the obligation of contracts.

U. S. Constitution, Article I, Sec. 10.

12. The act is unconstitutional in that it denies due process of law. It prescribes a duty which gasoline dealers must observe and makes the non-performance of the duty a criminal offense, yet states the duty in language so vague and obscure that one may not know its requirements.

Connally v. Construction Co., 269 U. S. 385.

13. The act denies due process for that, by its express terms, it took effect the moment it was signed by the Governor. No power was vested in any arm of the State to suspend the operation of the statute pending the performance of the conditions precedent which will necessarily require much time, during which the sale of gasoline is unlawful.

Infra, p. 60.

14. The decisions of the Federal Supreme Court, which have sustained legislation regulating the charges of elevator companies, insurance companies and the like are not applicable to the case at bar and are clearly distinguishable.

Infra, p. 18.

15. Nor do the decision of the Federal Supreme Court sustaining regulatory legislation, temporary in character and enacted to meet a war emergency, support legislation like that here involved.

Tyson v. Banton, 273 U. S. 437.

16. The act can not be saved by eliding the unconstitutional provisions for (1) every section is a part and parcel of the scheme of statutory regulation of prices and, therefore, violates the consti-

tutional guarantee of freedom of contract; (2) the sections sought to be saved by eliding others are not separable from such others; and (3) all the provisions of the act are so closely interwoven and so interdependent that it can not be said that the legislature would have passed any part of the act without the price regulation portion.

Infra, pp. 62 et seq.
Opinion below, Rec., p. 128.
Howard v. I. C. R. Co., 207 U. S. 501.

17. In Tennessee, "when the performance of any act is prohibited by statute and no penalty for the violation of such statute is imposed, the doing of such an act is misdemeanor," and is punishable at common law, i. e., by fine or imprisonment or both.

Opinion below, Rec., p. 124.
Tennessee Code of 1858, Sec. 4596.
Shannon's Code of Tennessee, Sec. 6437.
Pressly v. State, 114 Tenn. 534.

18. An injunction against the officers of the State who are charged with the enforcement of the act is the proper remedy.

Ex Parte Young, 207 U. S. 123.
Harrison v. Railroad, 232 U. S. 318.
Tyson v. Banton, 273 U. S. 418.

ARGUMENT

The court has had occasion so recently to consider the question of price regulation and has dealt with it so exhaustively that we feel a hesitancy in attempting to add anything to the discussion.

Tyson v. Banton, 273 U. S. 418.
Fairmount Co. v. Minn., 274 U. S. 1.
Ribnik v. McBride, 48 Sup. Ct. Rep. 545.

And we respectfully invite attention to the opinion of the court *a quo* in this case, found in the record at pp. 123-8, which deals clearly and forcefully with the questions here involved.

I.

This Act Violates the Fourteenth Amendment in That It Deprives Plaintiff of Its Freedom of Contract

The constitutional provisions applicable and their general meaning may here be stated.

> "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
> U. S. Constitution, Amendment XIV.

> "A corporation is a 'person' within the provision against deprivation of life, liberty, or

property 'without due process of law' (Turnpike Road Co. v. Sanford, 164 U. S. 578; Gulf Ry. v. Ellis, 165 U. S. 154; Dugger v. Insurance Co., 95 Tenn. 250); and it is a 'man' within the provision against deprivation of liberty or property otherwise than by 'the law of the land' (Railroad v. Harris, 99 Tenn. 705); hence, the defendant, which is a corporation, is entitled to the protection guaranteed by both provisions."

Harbison v. Iron Co., 103 Tenn. 427.

"The 'liberty' contemplated in each provision means not only the right of freedom from servitude, imprisonment, or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade or profession, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof. * * * 'In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto.' Allgeyer v. Louisiana, 165 U. S. 591."

Harbison v. Iron Co., 103 Tenn. 430.
Williams v. Fears, 179 U. S. 270.

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, State Freight Tax Case, 15 Wall. 232, 278, and as such, within the protection of the due process

of law clauses of the 5th and 14th Amendments."

Tyson v. Banton, 273 U. S. 429.

A more complete deprivation of the right of freedom of contract than this statute compels can hardly be conceived. A dealer in gasoline may not sell at all until he has a permit setting out the prices he may charge. He can get this permit only after making application and securing the approval thereof by the Superintendent and the Commissioner. If his prices do not suit them he must accept such prices as they dictate, subject to review in the courts, which of necessity must require much time. Even after he has obtained a permit his prices are liable to be upset on complaint of the Commissioner or any dealer or consumer. If occasion should arise for a change in price, he can make a change only after application to the Superintendent, for which much time is necessary. His prices must be uniform over the state save in so far as affected by freight rates. Local conditions or other considerations which might call for a difference in prices at different localities may not be considered. He can make no better price to quantity purchasers than to the smallest customer. If he operates in several localities, he cannot change his price in one without making a similar change in every other. If he is both a wholesaler and retailer, as is the case with many dealers, he must observe "reasonable" differentials—this, not for the protection of the consuming public but for the protection of other dealers at the expense of the

public. In short, freedom of contract, so far as prices are concerned, is completely taken away.

In Lochner v. New York, it was held that the New York Act limiting the time which employes in bakeries might work to a maximum of sixty hours a week and a maximum of ten hours in one day was an arbitrary interference with the freedom of contract guaranteed by the Fourteenth Amendment and could not be sustained as a valid exercise of the police power to protect the public health or the public welfare. In response to the state's claim of police power, the court said:

> "But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinet-maker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."
>
> Lochner v. New York, 198 U. S. 59.

> "The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances * * * and that it applies to the exercise of all the powers of

the state which can affect an individual or his property."

Louisville Gas Co. v. Coleman, 72 L. Ed. 488.

Authorities Dealing With the Phrase "Affected With a Public Interest"

The difficulty, if not the impossibility, of furnishing a standard by which all cases may be determined has been recently adverted to—273 U. S. 430. In the Wolff Packing Co. case, the court divided into three classes those businesses which may be said to be affected with a public interest or "impressed with a public use": (1) Those carried on under authority of a public grant or privilege, like railroads and public utilities; (2) other occupations regarded as exceptional and recognized from earliest times as subject to regulation, like those of inn-keepers, grist mills and the like; and (3) those which, though not public in their nature, may fairly be said to have risen to be such and which "have come to hold such a peculiar relation to the public that the regulation is self-imposed upon them."

Wolff Packing Co. v. Court, 262 U. S. 522.

A review of the decided cases dealing with the subject is the only means by which this brief may be made helpful. It is important to note, at the outset, that the term "public use" in the connection above indicated has quite a different meaning from the same term as employed in statutes authorizing condemnation proceedings or the levy of taxes. Its use in the latter cases is admittedly one

of wider scope than when the same term is used to describe that which clothes a property or business "with a public use." For example, in Jones v. Portland, 245 U. S. 217, the city had established a public wood and coal yard and levied a tax for its maintenance and operation. The court held that such an enterprise was a public use which would justify the exercise of the power *of taxation,* but manifestly, as this Court has indicated, a different question would have been presented had the legislature undertaken to fix the charges of private individuals operating fuel yards.

Wolff Packing Co. v. Court, 262 U. S. 537.

Munn v. Illinois

This, a leading case, upheld the right of the state to regulate the charges of elevator companies. The basis of the decision was the fact that *the elevators were a part of the facilities for the common carriage of grain.* This is made quite plain by the opinion.

As is well known, there are three articles of commerce for the handling of which the ordinary depot facilities of common carriers are confessedly inadequate—live stock, grain and cotton—and the right of a carrier to delegate to a private corporation the duty of furnishing depot facilities for the receipt and forwarding of such articles of commerce has long been recognized by courts and legislatures alike. Grain elevators, stockyards and cotton compresses are, therefore, in effect a part of the facilities of the common carriers on whose

lines they lie and are subject to much the same regulation and control as the carriers themselves. The court was therefore dealing wholly with the price to be charged *by an agent of a common carrier for services rendered.* The case in no respect involved the right of the state to fix the price at which an ordinary dealer in commercial articles may sell his wares. Point is given to this by the following paragraph in the opinion of the Court:

> "We are also not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the General Assembly to pass laws 'for the protection of producers, shippers and receivers of grain and product,' Art. XIII., Sec. 7; and by Sec. 5 of the same article to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads."
>
> Munn v. Illinois, 94 U. S. 132.

All this is further borne out by the definition of "transportation" as expressed in the Interstate Commerce Act:

> "The term 'transportation' as used in this act shall include locomotives, cars, and other

vehicles, vessels and all instrumentalities and facilities of shipment of carriers *irrespective of the ownership of or of any contract, expressed or implied, for the use thereof,* and also services in connection with the receipt, delivery, *elevation,* and transfer . . . of property transported."

Interstate Commerce Act, Sec. 1, Par. 3.

The same consideration induced the holding in subsequent cases, conspicuously that of Budd v. New York, 143 U. S. 517. While it was not specifically mentioned in the majority opinion in Brass v. North Dakota, 153 U. S. 391, it was none the less present as will appear from the statement of the case (pp. 397-8) and from the further statement of facts as set forth in Mr. Justice Brewer's dissenting opinion. The duty of regulating such elevator charges under the North Dakota statute was vested by that act in the Railroad Commission and it definitely appeared that the elevators affected thereby were in practical effect a part of the facilities of the railroads serving them.

Stafford v. Wallace, 258 U. S. 735.

German Alliance Insurance Co. v. Lewis

This case is so fully discussed in the opinion in the Theatre Ticket Case that an elaborate analysis here will serve no useful purpose. It is enough to point out the following salient principles there declared:

Insurance Companies "do not sell commodities; they do not sell anything." The case, therefore,

involved a regulation of charges for service and not the price of a commodity. Those charges may be "assimilated to a tax." Such companies are to be treated as self-constituted trustees for the public, organized and maintained for the purpose of distributing among the people at large the losses sustained by particular individuals through fire or similar casualties. The public, therefore, is interested not merely in having the charges of those companies for such service not exorbitant but is equally interested in having those charges not too low. If an insurance company, through an excess of zeal for business, should make its charges unreasonably low, its solvency, in which the public has a vital interest, would be affected.

Those companies hold, as virtual trustees for the people, very large amounts of money; they are "the depositories of the money of the insured, possessing great power thereby and charged with great responsibilty." For that reason, their business is "impressed with a public use." "A large portion of the country's wealth" is protected by insurance. In the funds they hold "all are interested, not in some vague or some sentimental way, but in a very real, practical and definite sense."

The court took special care to point out that its opinion was dealing only with the particular case before it and it has since been observed that the decision there "marks the extreme limit to which this court has thus far gone in sustaining price fixing legislation" (273 U. S. 434). It was also pointed out that, by virtually common consent, in-

surance companies have been regarded since early times as subject to such regulation.

German All. Ins. Co. v. Lewis, 233 U. S. 412.

None of the considerations mentioned apply to the business of selling gasoline.

Wolff Packing Company Cases

There were two of these cases, each involving a statute of Kansas known as the "Industrial Relations Act" which specifically declared that the manufacture and preparation of food for human consumption was a matter affected with a public interest. It created an industrial court with power to fix wages and other conditions of business under which manufacturers of food might continue business in the state.

The first appeal involved that part of the Act regulating the wages of packinghouse employes and that part of the Act was held unconstitutional.

Wolff Pack. Co. v. Court, 262 U. S. 522.

The same statute was under review later with respect to its provision fixing the hours of labor and other regulatory measures designed to avoid interruption of production. The court held that the state court "should have declined to give effect to any part of the order of the state agency."

Wolff Pack. Co. v. Court, 267 U. S. 552.

Throughout both opinions runs the thought, reiterated in subsequent cases, that:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Wolff Pack Co. v. Court, 262 U. S. 537.

It is worthy of note that the commodity involved in these cases was *food.*

The Theatre Ticket Case

This case involved the constitutionality of a New York statute regulating the price at which theatre ticket brokers, who had purchased tickets from theatre owners, might resell the tickets—limiting such price to 50 cents in excess of the price as printed on the face of the ticket by the theatre owner. The act specifically declared that the price for admission to theatres and similar places of amusement "is a matter affected with a public interest and subject to the supervision of the state

for the purpose of safeguarding the public from *fraud, extortion, exorbitant rates and similar abuses.*" The plaintiff, a ticket broker, filed his bill against the District Attorney and others to enjoin the enforcement of the act on the ground that it violated the Fourteenth Amendment. This Court, reversing the judgment of the lower court which denied the injunction, declared the act unconstitutional, holding that the price for admission to theaters or similar places of amusement was not a matter affected with a public interest but was a purely private interest and that the act deprived the plaintiff of the freedom of contract guaranteed by the Fourteenth Amendment. The court further indicated that, while some of the evils in connection with theatre prices set out in the statute exist, they can only be corrected by constitutional means *and that the regulation of prices is not such a means.*

Tyson v. Banton, 273 U. S. 418.

Fairmount Creamery Co. v. Minnesota

The decision in the theatre ticket case was approved and followed in the Fairmount Creamery case. The court there had under consideration a Minnesota act providing that any person engaged in the business of buying milk, cream or butterfat for manufacture or sale who shall discriminate between different localities in the state by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by such person in another locality, after making due allowance for difference, if any, in freight rates,

shall be deemed guilty of unfair discrimination and, upon conviction, be fined or imprisoned or both.

The Court reversed a conviction of the defendant, a corporation, under this statute on the ground that the act was unconstitutional as a denial of the freedom of contract guaranteed by the Fourteenth Amendment. The State Supreme Court, in upholding this statute, had said:

> "A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a non-competitive basis. If it does all this successfully, it has a monopoly and may or may not treat producers justly. The statute seeks to prevent the destruction of competition by forbidding overbidding unless the dealer makes prices at other buying points correspond after proper allowance for the cost of transportation."

This Court, after quoting this excerpt, proceeded to point out that such an argument afforded no justification for the state's interference with the corporation's freedom of contract as guaranteed by the Fourteenth Amendment, quoting from and approving the Tyson case.

It is interesting to note how similar the provisions of the Minnesota act are to those of the act

here under consideration. The latter act provides (Sec. 8, p. 21):

> "It shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further that dealers shall maintain proper differentials between wholesale and retail prices as such differentials may be fixed and determined by the Superintendent."

The principle declared in this decision is that the dairy business, though large and of vital interest to the people, was still a private one and not "affected with a public interest."

Fairmount Creamery Case, 274 U. S. 1.

Ribnik v. McBride

This case involved an act of New Jersey regulating the operation of employment agencies and conferring on the State Commissioner of Labor the power to fix the prices which an employment agent might charge for his services. The court conceded the power of the state to require a license and to regulate the business of an employment agent but declared the question presented to be whether the

Federal Constitution was violated by legislation which attempted to confer upon the Commissioner of Labor power to fix the price to be charged by the employment agent for his services. It was contended that the legislation came within the last of the three categories set forth by this court in the Wolff case, 262 U. S. 535, so that the question presented was "has the business in question been devoted to the public use and an interest in effect granted to the public in that use?" The Court, reaffirming the views announced in the Theatre Ticket case (273 U. S. 418), held that the business of an employment agent was not one affected with a public interest and, therefore, not subject to regulation by the state as to prices.

Ribnik v. McBride, 72 L. Ed. 614.

Allnut v. Inglis, 12 East 527

This case is reviewed in defendants' brief at p. 38. That review fails to notice two controlling considerations. The court was dealing with a party holding "a legal monopoly on landing goods in a public port." He was, therefore, enjoying a special franchise or privilege—the "legal" monopoly in question—and his business was furnishing facilities for the common carriage of goods. The review also fails to take cognizance of the fact that the English Parliament was "omnipotent" (262 U. S. 537) and, therefore, bound by no constitutional limitations.

The court in the Allnut case, as Lord Hale in de Portibus Maris, could not possibly have been

considering constitutional limitations. They were dealing merely with the propriety of the exercise of a conceded power. And there was the same idea in the mind of Mr. Chief Justice Waite when, in the Munn, opinion, he was discussing these authorities.

Other Cases

The case of Van Dyke v. Geary, 244 U. S. 39, is cited by defendants. It is enough to point out that the water plant whose rates were there involved was held by the court to be *"a public utility,"* the court adding:

> "The fact that the service is limited to a part of the Town of Miami does not prevent the water system being a public utility."

The right of the State to regulate the charges of a public utility corporation is not an open question. It could hardly be contended, however, that dealers in gasoline who merely maintain stores at which the public may call and buy are conducting public utilities.

The case of Oklahoma Natural Gas Co. v. Oklahoma, 78 Okla. 5, and 261 U. S. 290 is cited. That litigation involved the rates of *public service corporations.* They had recognized the right of the Oklahoma Corporation Commission to fix rates and had applied for higher rates but were denied an advance, whereupon a bill was filed asking for an injunction unless adequate rates were allowed. Manifestly the case has no pertinency here.

The case of Stafford v. Wallace, 258 U. S. 735, is cited. That case involved the "constitutionality of the Packers and Stockyards Act of 1921 so far as that act provides for the supervision by federal authority of the busines of the commission men and of the live stock dealers in the great stockyards of the country." The bill sought to restrain the enforcement of an order of the Secretary of Agriculture in carrying out the act. The court held, in line with the case of Munn v. Illinois, that the various stockyards of the country, in receiving by rail stock from the ranges and farms of the West and in shipping by rail to consumers in the East, are an interstate commerce agency; that they are therefore "*great national public utilities* to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." The validity of the act was sustained on that ground.

The District of Columbia sought to regulate the rates of a taxicab company on the theory that it was a common carrier. The court held that this was true in respect of the exercise of *its exclusive right* under the lease from the Union Railway Station to solicit deliveries and taxicab business from persons passing to or from trains and similar exclusive rights under similar contracts with the Washington hotels to solicit business from guests but that such part of its business as consisted of furnishing automobiles from its central garage on individual orders generally by telephone could not be regarded as affected with a public interest and

was not subject to regulation by the Commission.
Terminal Taxicab Co. v. Kutz, 241 U. S. 252.

Reliance is placed by defendants on cases supposed to uphold the right of the government to fix lawyers' fees.

Yeiser v. Dysart, 267 U. S. 538.
Capital Trust Co. v. Calhoun, 250 U. S. 208.

In the latter case one Arnold presented a claim against the government which was referred by the Senate to the Court of Claims. That court found in the claimant's favor for $5,051.00 and this finding was certified to congress. There was, of course, no way of collecting the claim except by legislation, and Congress passed an act appropriating the money to pay the claim, but added a proviso that not more than 20% of the amount so appropriated should be used or received on account of services rendered in connection with the claim. In upholding this limitation of 20%, the court pointed out that it was a qualification of a specially created right which Congress had power to impose. There is no suggestion whatever in the opinion that the business of a lawyer is one affected with a public interest and his fees the subject of governmental regulation. The same principle applies to the case of Yeiser v. Dysart, which involved a provision in a Workmen's Compensation Act that no fees should be paid out of any amount received under that act except such as the court should allow.

Reliance is also placed by defendants on the case of Crescent Cotton Oil Co. v. Mississippi, 257 U. S.

129. The case involved a statute of Mississippi prohibiting all corporations, whether organized under the laws of Mississippi or otherwise, from owning and operating a cotton gin when such corporation is interested in the manufacture of cotton seed oil or cotton seed meal. The argument made was that the statute was unconstitutional in that it applied to corporations and not to individuals. There was in no way involved a claim on the part of the state of the right to distinguish between domestic and foreign corporations as to the transaction of business in the state.

Gasoline Business Not One Affected With a Public Interest

Gasoline dealers exercise no public franchise nor any special privilege. They enjoy no right not common to all merchants. Their commodity, in its relation to the public, is in no respect different from other commodities of common use. It is sold to the public by large and small dealers alike. It is no more essential to the every-day life of the people than are many other commodities. In this respect, it can not be differentiated from food, from clothing, from fuel, from shoes, from razors nor from dozens of other articles of common use. The use of all such articles is just as universal and they are just as essential to the life of the average man as is gasoline—often more so. If the gasoline business, by virtue of the universality of the use of gasoline, shall be held to be "affected with a public interest," where shall the line then be drawn? The same principle would apply to dealers in stor-

age batteries, to dealers in tires—indeed *to dealers in automobiles themselves.* Proper oil and lubrication are as essential to automobile operation as is gasoline, and regulation of the prices for oil and for greasing service would be justified. Every person engaged in selling automobiles or their accessories, and their patrons as well, would be "at the mercy of legislative majorities" and freedom of contract would become a mere memory.

The only argument advanced for the view that the gasoline business is one affected with a public interest has been the assertion that gasoline is an article of universal use and is essential to our every-day life. What is the logical consequence of that argument?

> "We may live without friends; we may live without books;
>
> "But civilized man cannot live without cooks."

Shall it be said, in consequence, that the business of cooking is one affected with a public interest? To the feminine mind, cosmetics are much more essential than gasoline, but it could scarcely be said that, therefore, the business of cosmetics is one "impressed with a public use."

Gasoline is important—may be essential—to our business life, but it is used more largely for pleasure than for business. It is useful but it is also the criminal's greatest aid.

This Court has disposed of the defendants' argument based on the universality of use as follows:

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect to its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expressed the sense in which it is to be understood."

Tyson v. Banton, 273 U. S. 430.

Cotting v. Godard, 183 U. S. 112.

In language often since approved, the Court has thus indicated the difference between a private and a quasi-public business:

"It is said that this meaning is plainly to be inferred because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand and railroad transportation on the other. Among these differences are the public character of railroad business, and as a result the peculiar power of control and regulation possessed by the state over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether

the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

U. S. v. Freight Ass'n, 166 U. S. 320.

Legislative Declaration that Gasoline Business Is Affected with a Public Interest Not Effective

This Court has more than once held that such a legislation is not conclusive but that the question is a judicial one. The latest such holding occurs in the Theatre Ticket case following a similar decision in the Wolf Packing Co. case, 262 U. S. 536.

"Nor can we accept the theory than an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate commerce."

Real Silk Co. v. Portland, 268 U. S. 336.

The characterization, even by the State Supreme Court, of a tax can not bind this court.

Quaker City Co. v. Penn., 72 L. Ed. 607.
St. Louis Co. v. Ark., 260 U. S. 348.

Stress is laid by the defendants in their brief (p. 3) and in their answer (R., p. 51) upon the Governor's message recommending the passage of this Act. While that message charges a monopoly, it does not indicate that plaintiff has been guilty of it. The substance of this message is that the

people of Tennessee are being made to pay too high a price for gasoline. This is quite at variance with Exhibit No. 3 to defendant's answer (pp. 61-76) which is an original bill by a large number of independent gasoline dealers in Tennessee to the effect that gasoline prices in Tennessee are too low, and with the preliminary injunction secured upon the filing of that bill (p. 76) which compelled the major companies to raise their prices.

IV.

Right of State to Fix Price of Ordinary Articles of Commerce Never Recognized

All of the cases in this Court in which the right of the state to regulate charges was sustained—eliminating cases of temporary regulation justified by emergency of war and sustained on that ground alone—have been cases in which the regulation affected *charges for services.* In fact it seems that the state legislatures have rarely attempted to regulate the price of commercial articles. The case usually cited in this connection is that of Yuille v. Mobile, 3 Ala. (N. S.) 140, which is commonly supposed to be a case sustaining an ordinance regulating the price of bread. An examination of that case will show that while the ordinance did regulate the price of bread the only part of the ordinance under consideration by the court was that which regulated *the weight* of bread. The case was this:

> "This was a case agreed. The facts presented on the record are that the defendant in

error is a baker in the City of Mobile; that a quantity of bread made by him for sale was condemned for being of less weight than required by the proclamation of the Mayor."

In the course of the opinion of the Court, after referring to regulations affecting sanitation, interest charges and the like as lawful interferences with personal liberty, said:

> "If, however, such an inquiry were open, it would be very difficult to satisfy this court that the *assize of bread* in a populous city or town is an unwise regulation. The practice has prevailed too long and has been too generally, not to say almost universally, acquiesced in and continued to permit us to doubt that some regulation on this subject is necessary and proper." (Italics original.)
>
> Yuille v. Mobile, 3 Ala. (N. S.) 140.

The same ordinance regulated the price of bread but its validity in that respect was in no respect involved and we have been able to find no holding that, in the absence of an emergency like the existence of war, there is any authority in the state to regulate the price of any ordinary article of commerce.

Even as to the matter of the weight of bread, there are serious limitations upon the power of the legislature. Quite recently this Court has declared unconstitutional a Kansas statute regulating the weight of bread loaves.

Burns Baking Co. v. Bryan, 264 U. S. 504.

The legislature of Montana passed an act creating a State Trade Commission with power to regulate prices and profit, including those of ordinary mercantile businesses. Dealing with this the Court said:

> "Mindful of the familiar principles that control Federal courts in consideration of the constitutionality of state legislation, it is believed the enactment at bar is within the inhibition of the Fourteenth Amendment, and it is so determined. If there be any decision, by a court of last resort, contrary hereto, it has not been cited and is unknown. The Bakers' Bread Cases—Mobile v. Yuille, 3 Ala. 140, 36 Am. Dec. 441; Guillotte v. New Orleans, 12 La. Ann. 432—do not take account of the constitutional provisions here involved. A permanent injunction will issue."
>
> Holder Hdw. Co. v. Boyle, 263 Fed. 137.

V.

Assuming for the Purpose of Argument That Evils Exist in the Gasoline Industry, Those Evils May Not Be Cured Save by Legislation Which Comports with the Constitution

Here again is a proposition which has been declared and elaborated by the Supreme Court in the Theatre Ticket case and reiterated in the Fairmount Creamery case. See infra, p. 39.

Similar declarations have been made in other cases. For example, the Court, referring to the

supposed right of a state to exclude from its borders a foreign corporation for no other reason than that such is its will, has held that a state may not deny to such a corporation the right to enter the state nor the right to remain in the state unless it shall consent to a surrender of some right guaranteed by the Federal Constitution.

> "It has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution or laws of the United States. * * * Acts generally lawful may become unlawful when done to accomplish an unlawful end."
>
> Frost v. Railroad Commission, 271 U. S. 594, 599.

The opinion in that case reviews the authorities exhaustively and makes it clear that *a state may not use a lawful power for an unlawful purpose or exercise an unlawful power for a lawful purpose.*

VI.

Price Regulation an Unconstitutional Remedy

In the very nature of things a price regulating statute such as is here involved can not be a constitutional remedy for the evils alleged to exist in the gasoline industry—evils which we by no means admit. The Act is all embracing and must be so since otherwise it would be unconstitutional as discriminatory.

Cotting v. Godard, 183 U. S. 79.

McFarland v. Sugar Ref. Co., 241 U. S. 79.

And yet the all-embracing character of this legislation must necessarily accomplish its downfall. This can not be better stated than in the language of the Court in the Theatre Ticket case, quoted and approved in the Fairmount Creamery case:

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with—Com. v. O'Brien, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely

be entangled in its meshes, some wrong-doers also may be caught."

Tyson v. Banton, 273 U. S. 442.
Fairmount Co. v. Minn., 274 U. S. 10.
U. S. v. Reese, 92 U. S. 221.

It is no answer to this argument to say that this plaintiff, which operates all over the state, may not assert that the act is unconstitutional as to a small merchant. No line can be drawn on one side of which are placed large dealers in gasoline and on the other side small dealers. It would be impossible to draw such a line correctly—impossible to say at what point the regulation should begin and at what point it should end. The proposition that *the state may not regulate the price of some dealers and leave other dealers to fix their own price* needs neither elaboration nor authority. As pointed out in cases already referred to, the Court has more than once stricken down state legislation on the ground that it was partial in its operation.

"If once the door is open to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is open to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made" (Infra, p. 48, 49).

Cotting v. Godard, 183 U. S. 112.

We say, therefore, with confidence, that any dealer affected by the act may urge against it that, of necessity, it embraces all dealers alike and that, being unconstitutional as to a large number of them and, therefore, not binding on them, it is unconstitutional as to all and none are bound by it.

In Schlesinger v. Wisconsin, 270 U. S. 240, the court stated the rule very clearly that *rights granted by the Federal Constitution to one person can not be infringed in order to prevent violation of law by another person.* Therefore, the charges—wholly unwarranted we say—as to the plaintiff here can afford no support to the act under consideration. For if the act is void as to those dealers against whom it is not pretended such charges can be made, it necessarily fails as to all dealers.

In this connection the following language of Mr. Justice Holmes, though occurring in a dissenting opinion, is pertinent and of undoubted soundness.

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law, of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to

find the meaning of some not very difficult words. We must try—I have tried—to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court."

Northern Securities Co. v. U. S., 193 U. S. 400.

Applying this principle to the case at bar—if a small country merchant who maintains a single gasoline pump as an incident to his grocery store were indicted for a violation of this statute, could a conviction lawfully be had? If not, the act is invalid as to every dealer no matter how large *for the mere largeness of an individual's business can not lessen his rights under the Constitution.*

Cotting v. Godard, 183 U. S. 104.

Equal Protection of the Law

This bill affects corporations and individuals alike and we have argued that it must be so or it would violate the guarantee of the equal protection of the law. This is made clear by the recent case of Quaker City Cab Co., in which the court struck down the statute of Pennsylvania imposing a tax on all corporations, foreign or domestic, engaged in public transportation, but not applying to individuals or partnerships. It was held that this was a denial of the equal protection of the law and must be declared unconstitutional, even though the complaining party was a foreign corporation.

Quaker City Cab Co. v. Penn., 72 L. Ed. 607.

VII.

Act Invalid Because Its Purpose and Effect Is Not Merely to Protect Price Paid by the Consuming Public but Margins in Favor of Middlemen

As already indicated, a dominant purpose and effect of this act is to protect the differential, that is to say, the margin between the price the middleman pays and the price at which he sells. The italicized portions (infra, pp. 2-6) make this plain. This margin is sought as between tankcar and tankwagon prices and also between tankwagon and service station prices. It can be accomplished by lowering the price which the middleman pays or by raising the price at which he sells, or through both methods. The price at which the tankcar purchasers buy, being fixed in a foreign state, is beyond the control of Tennessee Commissioner, with the result that this margin or differential must often be protected by raising the price to the consumer.

Argument is not necessary to prove that, whatever may be the power of the legislature to protect the consuming public from exorbitant prices, there can be no power to regulate prices with a view to protecting the middleman at the expense of the consuming public. So much of the act, therefore, as undertakes to protect the differential is void.

Lest it be thought that this argument about the differential is theoretical and not practical, we respectfully direct attention to Exhibit No. 3 to the answer of the defendants here (pp. 61-76) which is

a copy of the original bill filed by twenty-one independent dealers against six major companies in the Chancery Court of Rutherford County, Tennessee, and particularly to the temporary injunction granted upon the filing of that bill (p. 76), which the Chancellor (p. 107) refused to dissolve. That injunction mandatorially compelled the defendant companies to raise their prices for gasoline in Tennessee.

VIII.

That Plaintiff Is a Foreign Corporation Cannot Defeat Its Right to Relief

While it is frequently said that foreign corporations cannot do business in a state except by its consent and may be arbitrarily subjected to such conditions as the state chooses to name, that principle cannot save this statute for the reason that the state cannot exact of a foreign corporation a sacrifice of its constitutional rights as a condition precedent to its *engaging or continuing* in business within the state. It cannot impose an unconstitutional condition. The foreign corporation, after admission into a state, stands on an equal footing and must be classified with domestic corporations of the same kind. While the state, without discrimination, may provide that, for failure of a foreign corporation to comply with any law governing its conduct within the state, its license may be revoked, such law must be valid and constitutional. Therefore, an act imposing a much heavier tax on the property of foreign insurance companies than is imposed on domestic insurance companies of the

same kind, being in violation of the Fourteenth Amendment, cannot be sustained on the ground of the State's right to exclude a foreign corporation from its borders. And the coming into a state of a foreign corporation with knowledge of conditions imposed by the state is not a contractual waiver of its constitutional privileges and does not preclude it from objecting to a state statute which violates the equal protection clause of the Fourteenth Amendment.

Hanover Ins. Co. v. Carr, 272 U. S. 494.
Quaker City Co. v. Penn., 72 L. Ed. 607.

The case of Fidelity Deposit Co. v. Tafoya, 270 U. S. 426, was a bill by a foreign insurance company against the members of the Corporation Commission of New Mexico to enjoin them from excluding plaintiff from the right to do business in the state. In reversing the decree of the lower court which denied an injunction and sustaining the right to an injunction, the Court held that a foreign corporation is entitled to seek the aid of the Federal Court to prevent its exclusion from the state in violation of its constitutional rights, even though the statute relied upon to justify the exclusion does not plainly import to justify and require the threatened exclusion, and its constitutional right is not denied. The opinion refers to the right of the state arbitrarily to exclude a foreign corporation "without other reasons than that such is its will," and adds:

> "But it has been held a great many times that the most absolute seeming rights are qual-

ified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result (citing authorities). Thus the right to exclude a foreign corporation cannot be used to prevent its resorting to a Federal Court (citing authorities), or to tax it upon property that by established principles the state has no power to tax (citing authorities. . ."

Fidelity Co. v. Tafoya, 270 U. S. 426.
Palmetto Ins. Co. v. Conn., 272 U. S. 304.

The state of Ohio undertook to fix as a condition precedent to the right of a foreign corporation to do an intrastate business therein a privilege tax based upon the entire authorized capital stock of the corporation, which in the particular case was very much more than the stock actually issued. The corporation filed its bill to enjoin the collection of so much of the tax as was exorbitant and the state defended on the ground that it had the right to name any condition it pleased upon a foreign corporation desiring to enter its borders. In sustaining the injunction, the court held that a privilege tax on a foreign corporation must bear some reasonable relation to the value of the privilege and that the act imposing the tax in question "violated the equal protection clause of the Fourteenth Amendment."

Air-Way Co. v. Day, 266 U. S. 71.

In Frost v. Railroad Commission, 271 U. S. 583, it was held that a private carrier was unconstitu-

tionally deprived of his property without due process of law by a requirement of the state that he become a public carrier in order to secure a permit to use the public highways for transportation purposes. The opinion elaborates the proposition that while the state may exclude a foreign corporation for no other reason than that it wants to do so, still it cannot exercise this power to accomplish an unconstitutional purpose, for "acts generally lawful may become unlawful when done to accomplish an unlawful end," quoting at length from Security Ins. Co. v. Prewitt, 202 U. S. 246, and other cases, particularly W. U. Tel Co. v. Kansas, 216 U. S. 1. Among other quotations was this from Justice Day's dissent in the Prewitt Case.

> "Conceding the right of a state to exclude foreign corporations, we must not overlook the limits upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the state would be permitted to destroy the right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state. . . . While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Consti-

tution which secured to alien citizens the rights to resort to the courts of the United States." Frost v. Railroad Commission, 271 U. S. 596.

If the right to regulate prices rests alone upon the fact that the plaintiff is a foreign corporation, then there is no right in the State to regulate the prices charged by domestic corporations and the situation would result that dealers who are foreign corporations must sell at prices fixed by the State, while domestic corporations and individuals can sell at any price they please. That such a situation would amount to a denial of the equal protection of the law seems plain.

IX.

Alleged Unlawful Practices No Justification for Denial of Constitutional Rights

The charges made in defendant's answer against the plaintiff here have no place in this discussion. While we by no means admit they are true, we shall move to strike them out as impertinent and, therefore, there is no occasion for going into the truth of them now. The principle that neither the piety nor the depravity of persons affected by an act determine its constitutionality has been thus well expressed by the Tennessee Supreme Court—language afterwards quoted and approved by this Court:

> "Every partial or private law which directly purpose to destroy or affect individual rights, or does the same thing by affording remedies

leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule and the mass of the community who made the law by another."

Vanzant v. Waddel, 2 Yerg. 270.

Cotting v. Godard, 183 U. S. 105.

The same view has been expressed in a case which involved a statute of Louisiana attempting to regulate prices:

"The answer alleges that the plaintiff is a monopoly and combination in restraint of trade in buying, refining, and selling sugar throughout the United States and, completely controls the sugar trade in Louisiana, and sets forth a long series of letters thought to show efforts to obtain and keep such control. It obliquely intimates that the plaintiff can fix prices on occasion even in the New York market, admitted to be the ruling one in the United States. It alleges that suits have been brought against the plaintiff by sugar planters, under the Sherman Act (26 Stat. at L. 209, Chap. 647, Comp. Sta. 1913, Sec. 8820), for a total of near $200,000,000, and that after the exposure of the plaintiff's criminality in a suit by the United States that seemed to have come to nothing, this law was passed. All of the foregoing, the main portion of the answer, is offered as ground for denying to the plaintiff any equitable relief. . . . We deem it enough to say that neither that supposed connection nor the

> general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way."
>
> McFarland v. American Sugar Ref. Co., 241 U. S. 84-85.

It may be observed that the record in the Theatre Ticket case disclosed a practical monopoly on the part of the agents whose prices were sought to be regulated, that the legislature had declared in the statute that such regulation *was necessary* to safeguard "the public against *fraud, extortion, exorbitant rates and similar abuses,*" and that the Court recognized that "such evils exist in some degree." None the less the Court held that the ticket agents were entitled to assert their constitutional rights and to have them protected and that a regulation of their charges was not a constitutional method of correcting the alleged abuses.

In the Fairmount Creamery case, the court pointed out that "there is no profession, probably no business, which does not offer peculiar opportunities for reprehensible practices" but that this could not justify the submersion of the fundamental guarantees of the Constitution. See also

Adams v. Tanner, 244 U. S. 594.

Act Not Supportable on the Theory of Threatened Monopoly and the Protection of Competition

The charges by the defendants of a monopoly on the part of the plaintiff here permeate their

answer and their brief. They ask to have the fact of monopoly taken for granted. Those charges, so far as they relate to the present, are but the expression of a popular fiction and oft reiteration can not make them true. For reasons elsewhere indicated (*infra,* p. 48), we think them wholly irrelevant but, because they are so emphasized, both in the answer and the brief of the defendants, and lest our silence on the subject be taken as a tacit admission of those charges, we ask leave for a brief reference to them.

1. It is charged (pp. 28-30) that by the decree of the Tennessee Supreme Court (120 Tenn. 86, affirmed 217 U. S. 413) the Standard Oil Company of Kentucky was ousted from the state for monopolistic conduct and that the appellee here, the Standard Oil Company of Louisiana, at once took its place. That was in May, 1910. Elsewhere herein (p. 69) we have pointed out that the decree of ouster and the injunction embraced therein can have no effect against the appellee here. It may be added that the wrong-doing on which the ouster decree was based was an isolated instance in the town of Gallatin in which the Kentucky Company, by the gift of a small quantity of oil, induced three persons to cancel orders they had given to the Evansville Oil Company.

2. It is charged (p. 36) that the Supreme Court of Ohio found that the Standard Oil Company of Ohio was a party to an unlawful combination, in consequence of which it was prohibited from doing business in that state. That decree was rendered

in March, 1892—thirty-six years ago—and is of of no possible probative force here.

3. It is charged (pp. 36-37) that this Court, in what is know as the Standard Oil Cases, 221 U. S. 1, adjudged that an unlawful combination existed among the Standard Oil Companies. The decree in that case was rendered May 15, 1911. It was against thirty-seven oil and/or pipe line companies, including the Standard Oil Company of New Jersey, and seven individuals who were in alleged control of the defendant companies and, in language clear, emphatic and all-embracing, enjoined those defendants from continuing in any way the monopoly or control theretofore existing *or any like combination or conspiracy,* the effect of which would be to restrain commerce in petroleum or its products among the states or with foreign nations. That decree is set forth in full in the margin of 173 Fed. Rep. 199. With respect to that decree, the defendants say:

> "Aside from a colorable distribution of the stock held by the Parent Company, the order of the Supreme Court of the United States has never been complied with, and the evils condemned in the opinion of the Court, in that cause, have never been remedied or abandoned."
>
> Record, p. 40.

This is a severe indictment, yet the defendants have the boldness to make it and to offer an argument on the faith of it. The statement means that

the decree of this Court, solemnly rendered, has been mocked and that the officers of the United States charged with administration of the federal law have wholly ignored their duty. Such an assumption will not be indulged. It may well be assumed, however, that the other charges made by the defendants here against the plaintiff are of the same character—unwarranted.

4. The answer refers to a report by a sub-committee of the Senate written by the late Senator LaFollette and adopted by the full committee. That report was made in 1923 and it does not appear that any action has been taken on it by the Senate or by any other arm of the federal government. It does not appear how far the investigation was judicial nor to what extent the Oil Companies denounced by the report were given an opportunity to present their case. The failure of the Senate to take any action on the report justifies the assumption that it did not reflect the views of the Senate.

5. The answer refers (pp. 43-48) to the charges in a bill filed by the United States against a number of oil companies, based on an alleged unlawful use of a patent known as the "cracking process" for the manufacture of gasoline. Those charges are those of an advocate and refer solely to the use of the patent. They have been vigorously denied by the defendants in the case. The litigation is still pending and undetermined.

6. The answer also refers (pp. 50, 61-114) to the suit of Consumers Oil Company et al v. Stand-

ard Oil Company et al, begun in January, 1925, by twenty-three independent oil dealers (p. 61) against the appellee here and six other major companies in the Chancery Court of Rutherford County, Tennessee. As in the previous instances, the charges were those of an advocate. The purpose of that bill was to have a mandatory injunction compelling the defendant companies to restore the differential of three or four cents between tank car and tank wagon prices and a similar differential between tank wagon and service station prices. That suit was voluntarily dismissed by the plaintiffs therein after the taking of much proof and after an admission on the witness stand by one of the complainants, himself a lawyer as well as a gasoline dealer, *that they had failed to show any conspiracy* (p. 116).

> 7. "It is to be noted that neither in its bill as originally filed, nor by any amendment thereto, for which it had full opportunity, did the Standard Oil Company of Louisiana anticipate or attempt to deny the existence of the facts and conditions set forth in the answer."
>
> Brief for Appellee, p. 30.

Believing that the charge of monopoly or of improper practices on the part of particular dealers can have no place in determining the vital question in this case—whether the gasoline business is one affected with a public interest—plaintiff forbore in its bill or by amendment thereof to deal

with such irrelevant matter. However, it does appear from the original bill (p. 11) that:

> "There are a number of companies operating in Tennessee which are large handlers of gasoline and rivals and competitors of plaintiff and of each other in the business of selling gasoline in Tennessee and elsewhere. Outside of Tennessee and constituting a principal source of supply are a large number of refineries with whose conduct and prices plaintiff has nothing to do."

The Act itself, in stating the reasons for its passage, does not charge the existence of a monopoly but merely "an attempt on the part of some dealers to monopolize the business and to destroy competition." And Exhibit No. 3 to defendants' answer (pp. 61-76) indicates the presence in Tennessee a short time before this Act was passed of a large number of gasoline dealers uncontrolled by the plaintiff and in sharp hostility to it.

Assuming, however, for the purposes of argument only, that the alleged "threat of monopoly" exists, it is clear that regulation of prices by the state is not a constitutional remedy. In the Theatre Ticket case, the legislature had specifically declared a regulation of prices to be necessary to prevent "extortion," meaning, of course, extortion through monopoly. It developed in that case that there was a monopoly in the theatre ticket brokers as to choice theatre seats. Referring to the claim

that the act was necessary to prevent fraud and extortion the Court said:

> "That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference."
>
> Tyson v. Banton, 273 U. S. 418.

The grant of a patent carries with it an intrinsically monopolistic right. Monopoly is the very essence of a patent. If, therefore, the existence of a monopoly affects an article with a public interest, it must follow that the State has the right to regulate the price of every patented article.

Aside from all this, the *act here involved does not protect competition but, on the contrary, destroys it.* With prices absolutely fixed, with an express prohibition against the making of any concession whatever, and with no right to change prices except with the Commissioner's consent, to secure which at least five days is necessary (p. 20, Sec. 6), no opportunity is left for the play of competition except as to service.

XI.

The Act in Question Violates Prohibition Against Impairment of Contracts

> "Plaintiff now has in Tennessee many contracts with purchasers of gasoline in Tennessee at varying prices, such price depending upon peculiar circumstances affecting particular cases, including a consideration of the quantity purchased, and the said act operates to annul and make unlawful all of those contracts."
>
> Record, p. 9.

The act in question contains no saving clause to protect valid contracts already entered into in good faith and is, therefore, unconstitutional in so far as it affects those contracts. Article I, Sec. 10, of the Federal Constitution provides that no state shall pass any law impairing the obligation of contracts.

XII.

Denial of Due Process of Law

The concluding sentence of the first paragraph of Sec. 8 of the Act reads:

> "And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about

> such unreasonable and unfair increase in such refinery price." No person who violates any of the provisions of this section shall be entitled to "a permit to engage in the wholesale or retail or intrastate sale of gasoline."

The rule is well settled that where an act prescribes a duty and fixes the penalty for violation thereof, it is a denial of due process where the duty prescribed is so vague and indefinite that one may not know definitely what it is.

Connally v. Construction Co., 269 U. S. 385.

Another case involved the validity of Sec. 4 of the Food Control Act, which made it unlawful

> "For any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing with any necessity; to conspire, combine, agree, or arrange with any other person * * * ; (e) to exact excessive prices for any necessity."

The court held that this act was invalid as a denial of due process of law because it fixed no ascertainable standard of guilt; that no such power existed in Congress even during a state of war; that whatever might be the effect of a war emergency on the right of freedom of contract (the restriction in such cases being only temporary), there was no suspension, even during war, of the constitutional right of the defendant in a criminal case to due process of law.

U. S. v. Cohen Co., 255 U. S. 88.

XIII.

Statute Unconstitutional Because, Taking Effect at Once, It Prevents the Sale of Gasoline Until the Performance of Conditions Precedent Which Will Require Much Time

It is declared unlawful to sell gasoline without a permit and the Act took effect the moment it was signed by the Governor. The conditions precedent to the issuance of a permit are that the Superintendent of the newly established Bureau of Motors and Motor Fuels shall be appointed. He is required to make elaborate investigations on his own initiative and to prepare and place of record data on the subject. He is also required to study the applications filed by the various applicants for permits. Of necessity, this will require much time. Before he can complete the discharge of these duties the applications for permits must be filed and those applications are required to contain information for the compilation of which much time will be required. There is no power vested in any arm of the State to suspend the operation of the statute during the time necessary to meet these conditions precedent to a permit.

It necessarily follows, therefore, that by the very terms of the Act a period which must be appreciable and may easily extend into several weeks, must elapse, during which the sale of gasoline in intrastate commerce is absolutely prohibited.

A statute of Ohio, known as the Blue Sky Law, forbade, among other things, the sale of securities

for 30 days after the dealer or issuing company had furnished to the Public Commission the required data. In holding this statute invalid on this ground, the court said:

> "During the period of 30 days after the application is made and data filed with the Commission, there can be no sale of the securities. The Commission is powerless to permit; any company which issues and sells or any dealer who sells is guilty of felony. This is the law, without regard to the character of the securities. They may be of the highest quality in every respect; the emergency requiring immediate sale may be extreme; these considerations cut no figure; the law proclaims a 30-day paralysis. If a company, perfectly solvent but in need immediately of ready money, arranges a bond issue and has people ready to purchase the bonds, nothing can be done for 30 days; in the meantime things must stop and the company, perhaps, must lose its credit and fail. Such a provision is an arbitrary and oppressive interference with the right of contract; it bears no 'reasonable relation' to the public health or the public morals, or even to the 'public welfare,' in the broadest conceivable sense of that phrase."
>
> Ala. Transp. Co. v. Doyle, 210 Fed. 181.

XIV.

Entire Act Unconstitutional. No Portion May Be Saved by Eliding Others

> "A law which can not endure the test of the Constitution without judicial amendment must perish."
>
> Howard v. I. C. R. Co., 207 U. S. 515.

A serious argument is made by the defendants that, even though such portions of the Act as undertake to regulate prices are unconstitutional, Sections 1, 2, 3 and 4, presently reviewed, should be allowed to stand. These sections provide: (1) for the creation of a bureau to administer the Act, (2) for the collection and study by the Commissioner of data relating to the cost and proper selling price of gasoline, (3) the issuance of a permit and (4) the furnishing by gasoline dealers of certain information as a condition precedent to a permit. It will be conceded that every other section relates directly and entirely to the fixing of gasoline prices. Even Section 11, which defines the term "gasoline," limits the definition of that word "as used in this Act."

In support of this argument of defendants, the principal reliance is the case of Weller v. New York, 268 U. S. 319, where so much of the New York Theatre Ticket Act as required ticket vendors to apply for a license was upheld after eliding that part of the Act which undertook to regulate resale prices. That case is obviously distinguishable from the instant case. The operative provisions of the

New York Act consisted of Sections 168-174, inclusive. If there is stricken from the Act Sec. 172 (which fixes prices) and from Secs. 169-170 the words "will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the prices authorized by this article," there remains, as the court pointed out, a workable plan. So altered, the Act would still require the procurement of a license for which $100.00 (to be a part of the general revenue of the state) is to be paid annually; the applicant is required to produce satisfactory proof of his moral character and to give bond that he will not be guilty of any fraud or extortion; the Comptroller is given the power, upon complaint of any citizen, to investigate the business and the business practices or methods of any licensee and to revoke the license if they are improper; and the courts are given power to punish violations of the Act.

Weller v. New York, 268 U. S. 319.

No such situation exists here. Stripped of its price fixing provisions, the present Act is emasculated and a statute the legislature never intended to pass is substituted for that actually passed.

Trade Mark Cases, 100 U. S. 82.

The controlling rule in this connection does not admit of debate. Two conditions are requisite: (1) the legal and illegal provisions must be clearly separable and (2) it must be "plain" that the legislature "would have enacted the legislation with the unconstitutional provisions eliminated."

Howard v. I. C. R. Co., 207 U. S. 501.

I. C. R. Co. v. McKendree, 206 U. S. 514.

The first four sections must fall not only because neither of the above conditions is met but because those sections are so much a part and parcel of the statutory scheme of regulation of prices as to be themselves unconstitutional. All this we believe is obvious upon an analysis of these sections.

It is important, at the outset, to note the purposes of the Act. They were three-fold: (1) To fix the prices at which wholesale and retail dealers should sell; (2) to provide (sec. 8) against selling at different prices to different persons in the same locality or at different prices to the same persons in different localities (this is in direct violation of the rule declared in the Fairmount Creamery case, 274 U. S. 1); and (3) to protect the differential, that is, to enact into law the remarkable injunction shown in defendants' Exhibit No. 3 (p. 76). Every provision of the Act was in aid of these purposes. These purposes being unconstitutional, the aids to their accomplishment must fall.

There should be also noted in this connection the provision of the Tennessee Constitution (Art. II, Sec. 17) that "no bill shall become a law which contains more than one subject, that subject to be expressed in the title." By numerous decisions, the Tennessee Supreme Court has indicated the necessity of observing this provision with exactness, and it must be assumed that the legislature had it in mind. The title to the Act here involved does not refer to the subject of collecting information and, therefore, Sections 2 and 4 would fall if they stood alone. The failure to refer to them in the

title indicates clearly that the legislature regarded them merely as aids to an announced purpose.

Reviewing the sections in question:

Section 1 creates a division of the Department of Finance & Taxation to be known as the "Division of Motors and Motor Fuels," same to be in charge of a superintendent. The only purpose of this section is to provide a department or bureau *for carrying out the price-fixing purpose of the Act.* No duties are assigned to the new division except in connection with price fixing.

Section 2 makes it the duty of the Commissioner to make investigation and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to dealers in Tennessee and elsewhere; freight rates; differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; and the like. The concluding part of Section 2 is this (p. 17):

> "It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State *at prices fixed and determined as hereinafter provided,* and to perform such other duties as may be prescribed by subsequent section of this Act."

The only "other duties" prescribed in the Act are the hearing of applications for change in prices

either by the applicant, the Attorney General, or some rival dealer, and the enforcement of the price fixing provisions.

It must be manifest, therefore, that Section 2 has no relation to any subject except that of price fixing and that the legislature would never have enacted it except as an aid to the price fixing purpose.

Section 3 makes it unlawful for any person to engage in the sale of gasoline in intrastate commerce in Tennessee without having first obtained a permit and no permit shall be issued "unless and until such dealer shall make application therefor in accordance with the regulations of this Act and *in compliance with all the requirements and provisions hereof.*"

Bearing in mind that the application for the permit must state the prices to be charged by the applicant, that those prices must be approved by the Commissioner and, if not approved by him must be so changed as he may direct, and that the permit itself *is limited to sales at the prices so approved,* it is obvious that Section 3 has no purpose or effect except the carrying out of the price regulating scheme. *The permit is merely a bureau order fixing prices.* And it may here be pointed out that the general Revenue Act of Tennessee now provides and has provided for years that no person may engage in the gasoline business without first securing a license and paying the prescribed priv-

ilege tax and such license the plaintiff already holds (p. 5).

Acts of Tenn. (1927), Ch. 89, pp. 320-21.

Section 4 provides that every person desiring to engage in the sale of gasoline in intrastate commerce in Tennessee must make application to the superintendent, setting out five specific items of information (*infra*, pp. 3-4), among which are (c) the price or prices at which the dealer at the time of the application is selling gasoline, (d) the cost price of such gasoline to the dealer including refinery cost, transportation, taxes, cost of distribution, etc., and (e) the price or prices at which he proposes to sell gasoline either as a wholesaler or as a retailer. Argument is not necessary that this section, like the others, is but a part of the scheme for price regulation by the State. The admitted purpose of this information is solely to enable the superintendent to determine what price he will fix.

Assuming that the price fixing sections of the statute fail, of what value is Section 4? The information called for by that section may become valueless immediately. For, within a week afterward, the dealer may change the character of his business from wholesaler to retailer or vice versa; he may change his place of location; he may sell his business to someone else. His cost price and operating expense fluctuate widely and often. Being under no regulation as to prices, he may change his prices given to the Commissioner the day after he gives them.

It thus appears that the first four sections of the Act—the sections which applicants are seeking to maintain even though the rest of the Act falls—are clearly a part and parcel of the scheme of price regulation and therefore not separable from the remainder of the Act and that the legislature would never have enacted them if it had been advised that the remaining sections of the Act were unconstitutional. Being a mere aid to unconstitutional requirements, they fall under the same condemnation.

Section 12 provides that if any section or provision of the Act shall be held invalid, the validity of the other sections shall not be affected. This cannot possibly prevent the court from determining for itself whether the provisions in question are separable and whether the legislature would have enacted any part of a section or sections if it had known that the manifest and declared purpose of the Act and all the provisions to that end were unconstitutional.

An effort is also made by the defendants to sustain Section 10 which provides that before any person may obtain a permit he shall pay a "special permit tax" of $10.00 for each wholesale place and $1.00 for each service station or curb pump—this to be in addition to all other license, inspection or ad valorem taxes and to be "*kept as a special maintenance fund* to aid in defraying the expenses" of the bureau created by the Act. It can not be used for any other purpose.

With all of the price fixing features of the Act eliminated, what expense will there be? What is there left for the newly created bureau to do?

It appears from the record (pp. 52-53) that the sales of gasoline in Tennessee in 1926 were 129,358,213 gallons—an increase over 1925 consumption of 19,000,000 gallons; that there are in use in Tennessee more than 280,000 motor vehicles, exclusive of farm tractors, stationary engines and the like. The record does not indicate the number of wholesale or retail places of business but we take it the Court will know judicially that gasoline filling stations are everywhere and that their number is legion.

The cost and expense which the legislature intended to provide for in the administration of this Act involved, therefore, the fixing of prices for innumerable places of sale and innumerable persons engaged in the sale of gasoline; the hearing and determination of many applications for change of prices; the enforcement of those prices and of other provisions of the Act. The mere clerical work involved in such an administration would be highly expensive and the other details of administration, including the services of the Attorney General, would make the cost of administration much more.

With the price fixing features of the Act annulled as unconstitutional, necessarily the expenses of the new bureau would be negligible.

From all this it seems clear that Section 10 providing for this permit tax can not be saved. It is such a part and parcel of the price fixing scheme as to be inseparable from the rest of it and it is clear that the legislature would never have enacted this section and imposed this tax but for the price fixing features of the Act.

XV.

Ouster of Plaintiff's Predecessor

The brief for appellees (p. 19) as well as the answer of defendants makes the contention that the Standard Oil Company of Kentucky was ousted from Tennessee for a violation of the state anti-trust Act; that thereafter the plaintiff, the Standard Oil Company of Louisiana, entered the state and took its place; that both corporations were under the same domination and control.

It is a matter of record that the decree of ouster was affirmed by this Court in May, 1910 (217 U. S. 413). The ousted company was a corporation of Kentucky and the plaintiff is a corporation of Louisiana, organized some years prior to 1910. The plaintiff entered the State of Tennessee in May, 1910 (pp. 4-5), and has remained there since without objection from any source, although its entry and continued presence were, of course, widely known. It now has an investment of $4,000,000 or more in the state (p. 4) and its annual sales of gasoline are around 50,000,000 gallons (p. 14). During that interval of eighteen years the State of Tennessee had three very able and effi-

cient Attorneys General, one of whom had conducted the ouster case. It is a violent assumption, indeed, that those officials allowed the decree in the ouster case to be ignored. Their inaction can only be construed as indicating a conviction on their part as to the effect of the decree.

The ownership of the stock of the two companies is not disclosed by the record beyond a mere general charge that they were under the same domination but the fact remains unchallenged that the two corporations are separate and distinct and organized under the laws of different states. That a corporation is a distinct entity from its stockholders is a principle long and well recognized.

Parker v. Hotel Co., 96 Tenn. 278.
Green v. Victor Co., 24 Fed. (2d) 380.
Donnell v. Herring Co., 208 U. S. 273.

XVI.

Injunction the Proper Remedy

On this question it may be sufficient to quote the opinion of the court *a quo*.

> "Preliminarily to the constitutional questions argued it is contended for the state that complainants are not in position to invoke relief from a court of equity because no property rights belonging to them have been affected by the Act or can be affected by it until a price has been fixed at which they must sell gasoline. It suffices, we think, to say in re-

sponse to this that the Act makes it unlawful to sell gasoline without having obtained a permit so to do from the superintendent of the Division of Motors and Motor Fuels, that it became effective from and after its passage, and that every sale of gasoline thereafter, made by a dealer, is under the terms of the Act unlawful and is punishable under Section 6437, Shannon's Code, as a misdemeanor. It is alleged in the bills as amended that the defendants are preparing to and will prosecute complainants for each violation of the Act, and indeed it is the duty of the Attorney General and his assistants, as well as the other prosecuting officers of the state, to prosecute any infractions of the law. Clearly, therefore, a continuation of the business of complainants would result in oppressive prosecutions which a court of equity may enjoin if the Act shall be determined invalid. Terrance v. Thompson, 263 U. S. 197, and authorities there cited."

Record, pp. 124-5.

The Act makes it unlawful to sell gasoline without a permit. By specific statute in Tennessee "when the performance of any act is prohibited by statute and no penalty for the violation of such statute is imposed, the doing of such an act is a misdemeanor."

Shannon's Tenn. Code. Sec. (4596) 6437.

The Supreme Court of Tennessee has definitely determined that such a misdemeanor is punishable

as at common law, that is to say by fine or imprisonment or both, saying:

"The rule at common law is thus stated by Mr. Bishop:

'The ordinary common law punishment for misdemeanors is fine and imprisonment, or either, at the discretion of the court. It is imposed whenever the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature, but is silent as to the punishment, the common law provides fine and imprisonment.' Bishop's New Criminal Law, Vol. 1, Sec. 940.

"The foregoing rule is recognized in several of our own cases (citing many cases); the fine being assessed by the court if $50 or under, and by the jury if over $50 (Shannon's Code, Sec. 7212); and the imprisonment to be fixed by the court (Shannon's Code, Sec. 7202). The Code further provides that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. Shannon's Code, Sec. 6437."

Pressly v. State. 114 Tenn. 539.

"It may, therefore, be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from

resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Ex parte Young, 209 U. S. 147.

Reading this announcement in the light of the law in Tennessee as quoted above, the right of the plaintiff here to file this injunction bill becomes manifest. Owning, as appears from the bill, 100 service stations, mostly in populous cities, and 135 bulk stations from which its tank wagons go out, its sales necessarily amount to thousands daily. If the plaintiff has not the right to file this injunction bill, then its only remedy for testing the constitutionality of this act is to submit to prosecutions for thousands of misdemeanors and take the risk incident to that course. As declared in ex parte Young, this is no remedy at all.

The principle announced in ex parte Young has often been since applied and an injunction granted to restrain state officers from enforcing unconstitutional state legislation.

Harrison v. Railroad, 232 U. S. 318.

Tyson v. Banton, 273 U. S. 418.

In two cases cited by the defendants the soundness of our contention as to the remedy here is sustained.

Okla. Operating Co. v. Love, 252 U. S. 331.

Okla. Gin Co. v. State, 252 U. S. 339.

In those causes, the court sustained the right to an injunction against an order of the State Commission fixing rates on the ground that "it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. . . . But the penalties which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident." The court added:

> "If, upon final hearing, the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory."
>
> Okla. Operating Co. v. Love, 252 U. S. 338.

These cases have no relation to the principal question here involved—whether the gasoline business is one affected with a public interest. They are cited only as to the remedy by injunction which we here claim. They make it clear that where, as in the case at bar, it will be hazardous to test the constitutionality of the act by submitting to an indictment, the plaintiff is entitled to proceed by bill in equity for injunction. As indicated by the quotation last made, if the plaintiff here should submit to an indictment and fail in its defense, it would then become liable to indictment and punishment for thousands of offenses committed while the question was being tested, whereas, under the pro-

ceeding here followed, there will be no such liability if the court shall find that the contest, even though unsuccessful, was in good faith.

On the whole case, we respectfully say, the plaintiff is entitled to the preliminary injunction.

Respectfully submitted,

JOHN W. DAVIS,
H. D. MINOR,
For Appellee (Plaintiff).

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[redacted]